oppression or discrimination were made out and neither was it satisfied that it would be just and equitable to wind up the company.

These findings are also relevant to our case except the real purpose of the petitioners here, to my mind, was just to teach the respondents a lesson.

I had accordingly dismissed the petition with costs. As regards the injunction order given on 3 November 1988, although counsel for the petitioners had submitted that no damages had been proved and counsel for the respondents had asked for it to be set aside with damages to be assessed and to be payable by the petitioners, I had refused to make any order since there had been no formal application to set it aside.

Petition dismissed.

Solicitors: *Kean Chye & Sivalingam; Almeida & Co; Ng Chee Kong & Co.*

Reported by *Yap Shao Sin*

Major Phang Yat Foo v Brigadier Jeneral Dato' Yahaya bin Yusof & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8-25-41-1989
EUSOFF CHIN J
2 AUGUST 1989

Armed Forces — Court-martial — Plea in bar of trial — Finding of not guilty — Whether confirming officer has power to confirm, withhold or refuse confirmation of finding of not guilty — Whether jurisdiction conferred on convening authority to reconvene a court-martial — Res judicata — Armed Forces Act 1972, ss 122, 123, 124, 125 & 146 — Armed Forces (Court-Martial) Rules of Procedure 1976, r 63 — Interpretation Act 1967, s 25

Administrative Law — Certiorari — Application to quash decision of respondents to convene fresh court martial — Whether rules in delegated legislation inconsistent and ultra vires parent Act — Armed Forces Act 1967, s 146(1) — Armed Forces (Court-Martial) Rules of Procedure 1976, r 63(3)

The applicant applied for an order of certiorari to quash the decision of the first respondent disapproving the decision of a court-martial and ordering the convening of a fresh court-martial to try the applicant and an order to prohibit the first respondent from convening a fresh court-martial to retry the applicant. The first respondent had convened a court-martial to try the applicant on eight charges. The applicant offered a plea in bar of trial in reliance upon s 146(1)(c) of the Armed Forces Act 1972 ('the Act'). The court-martial heard the evidence adduced and submissions by both the applicant and the prosecutor as provided under r 63(1)(a) and (b) of the Armed Forces (Court-Martial) Rules of Procedure 1976 ('the Rules'). The court-martial allowed the plea in bar of trial and reported its decision to the first respondent who was the convening officer who then purported to act under r 63(3)(b)(ii) of the Rules, disapproved the decision and made an order that a fresh court-martial would be convened to retry the applicant.

The applicant argued that (i) the said decision of the first respondent was wrong in law; (ii) the said decision was contrary to the provisions of s 146 of the Act; (iii) the said decision was made without or in excess of jurisdiction and ultra vires the Act. It was submitted that r 63(3) is invalid since the rule-making power given to the Minister of Defence by s 119 of the Act does not give the Minister the power to confer jurisdiction on the convening authority to reconvene a court-martial and is also inconsistent with s 146 of the Act.

Held, allowing the application:

(1) The courts do not act on their own motion or initiative to determine the vires of delegated legislation. The question of invalidity of a subsidiary legislation can be raised by way of a defence to a civil claim based on the subsidiary legislation or as a defence to a prosecution of an offence under a subsidiary legislation or a person may also challenge an action taken under subsidiary legislation by arguing against its validity.

(2) It is clear that s 119 of the Act gives power to the Minister to make rules of procedure only but not to make rules conferring jurisdiction on any person.

(3) Under s 126 of the Act, a 'confirming officer' has the power to confirm the finding or sentence of a court-martial. It does not give the power to confirm, to withhold or to refuse confirmation of a finding of not guilty made by a court-martial. It appears that the intention of Parliament is that there is a need for an order made by a court-martial to be confirmed by a confirming officer only where the court-martial has found an accused guilty of any charge. Therefore, where a court-martial has found an accused person not guilty of the offence charged, or as in this case, that the court-martial had found that the offence had been condoned by his commanding officer, the Act does not require, and does not confer any power on, a confirming officer or any other person to approve or confirm such finding or order made by the court martial.

(4) The provisions of s 146(1) of the Act are quite clear that once the court-martial has decided that an offence committed by the accused has been condoned by his commanding officer, the convening officer has to accept that finding or decision, and he cannot convene another court-martial to retry the accused on the same charges. Therefore, r 63(3) is void to the extent that it confers jurisdiction on the convening authority to disapprove a decision of a court-martial allowing a plea in bar of trial because such rule is inconsistent with ss 122 to 125 of the Act; it is also void to the extent that it confers jurisdiction on the convening authority to convene a fresh court-martial to try the accused on the same charges which a court-martial has found to have been condoned by the accused's commanding officer because this provision is inconsistent with s 146(1) of the Act.

(5) It can be seen quite clearly that the purpose of the first respondent's decision to convene a fresh court-martial is to enable the prosecutor to put in the first respondent's own opinion that one Lt Col Yeoh was not the proper commanding officer of the applicant in the form of fresh evidence so that the fresh court-martial will reject the plea in bar of trial put by the applicant. It is not disputed that the court-martial had been properly constituted and competent to hear and had heard evidence and arguments before making its decision. The matter is res judicata.

Case referred to

1 *Shedden* v *Chelmsford* [1861-73] All ER 724 (refd)

2 *National Union of Hotel, Bar & Restaurant Workers* v *Casuarina Beach Hotel Sdn Bhd* [1986] 2 MLJ 17 (refd)

Legislation referred to

Armed Forces Act 1972 ss 115, 119, 122, 123, 124, 125, 145, 146(1)(c), (2)
Armed Forces (Court-Martial) Rules of Procedure 1976 r 63(1), (2), (3)
Interpretation Act 1967 s 25
Rules of the High Court 1980 O 53 r 1(2)

Gurubachan Singh Johal for the applicant.
Salehuddin bin Saidin (Federal Counsel) for the respondents.

Cur Adv Vult

Eusoff Chin J: This is an application for:

i) an order of certiorari to remove into the High Court and quash the decision by the first respondent made on 25 March 1989 disapproving the decision of a court-martial and ordering the convening of a fresh court-martial to try the applicant; and
ii) an order prohibiting the first respondent from convening a fresh court-martial to retry the applicant.

It is not disputed by the parties that the first respondent, Brigadier General Dato' Yahaya bin Yusof, had convened a court-martial to try the applicant Major Phang Yat Foo on eight charges. Upon Major Phang offering a plea in bar of trial in reliance upon s 146(1)(c) of the Armed Forces Act 1972 ('the Act'), the court-martial heard evidence adduced, and submissions by both Major Phang and the prosecutor as provided under r 63(1)(a) and (b) of the Armed Forces (Court-Martial) Rules of Procedure 1976 ('the Rules'). The court-martial on 22 February 1989 made the decision to allow the plea in bar of trial, and reported its decision to the first respondent who was the convening officer (authority) under r 63(2) of the Rules. On 25 March 1989, the first respondent, purporting to act under r 63(3)(b)(ii) of the Rules, disapproved the decision of the court-martial, dissolved the court-martial and made an order that a fresh court-martial would be convened to retry Major Phang on the same charges.

The first three grounds upon which the applicant sought the reliefs are:

i) that the said decision of the respondent was wrong in law;
ii) that the said decision was contrary to the provisions of s 146 of the Armed Forces Act 1972;
iii) that the said decision was made without or in excess of jurisdiction and ultra vires the Act.

Rule 63 of the Rules states:

> (1) An accused may, before pleading to a charge, offer a plea in bar of trial in reliance upon sections 144 or 146 of the Act. If he does so:
>
> (a) the accused may adduce evidence in support of the plea and the prosecutor may adduce evidence in answer thereto; and
>
> (b) the prosecutor may address the court in answer to the plea and the accused may reply to the prosecution's address.
>
> (2) If the court allows the plea it shall adjourn and report to the convening authority except that if there is another charge or another charge sheet before the court, the court may, before adjourning under this Rule proceed with the trial of such other charge or other charge sheet.
>
> (3) When a court reports to the convening authority under this Rule, the convening authority shall:
>
> (a) if it approves the decision of the court to allow the plea:
> (i) dissolve the court; or
> (ii) where there is another charge or another charge sheet before the court to which the plea does not relate and which the court has not tried, direct the court to proceed with the trial of such other charge or charge sheet only;
>
> (b) if it disapproves the decision of the court to allow the plea:
> (i) where there is another charge or another charge sheet before the court to which the plea does not relate and which the court has not tried, direct the court to proceed with the trial of such other charge or charge sheet only; or
> (ii) convene a fresh court to try the accused.

It was submitted by learned counsel for the applicant that r 63(3) is invalid since the rule- making power given to the Minister of Defence by s 119 of the Act does not give the Minister the power to confer jurisdiction on the convening authority to reconvene a court-martial under the circumstances of the case. It is also inconsistent with the provision of s 146 of the Act.

Learned federal counsel for the respondents was contented not to advance any argument on this point, although as stated earlier, this was one of the grounds contained in the statement filed pursuant to O 53 r 1(2) of the Rules of the High Court 1980.

The courts do not act on their own motion or initiative to determine the vires of delegated legislation since under s 25 of the Interpretation Act 1967, subsidiary legislation 'shall be deemed to be made under all powers thereunto enabling, whether or not it purports to be made in exercise of any particular power or powers'. The question of invalidity of a subsidiary legislation can be raised by way of a defence to a civil claim based on the subsidiary legislation or as a defence to a prosecution of an offence under a subsidiary legislation or a person may also challenge an action taken under subsidiary legislation by arguing against its validity.

The Armed Forces (Court-Martial) Rules 1976 say that they have been made by the Minister in exercise of the powers conferred on him under s 119 of the Act which states:

> (1) Subject to the provisions of this section, the Minister may make rules (hereinafter referred to as Rules of Procedure)

with respect to the investigation and trial of, and awarding of punishment for, offences cognizable by courts-martial, commanding officers and appropriate superior authorities, and with respect to the confirmation and revision of findings and sentences of courts-martial.

(2) Without prejudice to the generality of the foregoing subsection, Rules of Procedure may make provisions with respect to all or any of the following matters, that is to say:

(a) the procedure to be observed in the bringing of charges before commanding officers and appropriate superior authorities;
(b) the manner in which charges so brought are to be investigated, and the taking of evidence (whether orally or in writing, whether or not on oath, and whether or not in full or in summary or abstract form) for the purpose of investigating or dealing summarily with such charges or otherwise as a preliminary to the trial thereof by court-martial, so however that the Rules of Procedure shall make provision for the application of section 109 in any case where the accused requires that the evidence shall be taken on oath;
(c) the addition to, or substitution for, a charge which has been investigated of a new charge for an offence disclosed by evidence taken on the investigation, and the treating of the investigation as the investigation of the new charge;
(d) the convening and constitution of courts-martial;
(e) the sittings, adjournment and dissolution of courts-martial;
(f) the procedure to be observed in trials by courts-martial;
(g) the representation of the accused at such trials;
(h) procuring the attendance of witnesses before court-martial and at the taking of evidence in pursuance of Rules of Procedure made under paragraph (b);
(i) applying in relation to proceedings before commanding officers and appropriate superior authorities and otherwise in relation to proceedings prior to trial by court-martial of all or any of the provisions of the four last foregoing sections;
(j) empowering a court-martial or the convening officer, in such cases and to such extent as may be prescribed, to amend a charge which is being tried by a court-martial;
(k) empowering a court-martial where the particulars proved or admitted at the trial differ from those alleged in the charge but are sufficient to support a finding of guilty of a like offence as that charged, to make a finding of guilty subject to exceptions or variations specified in the finding if it appears to the court that the difference is not so material as to have prejudiced the accused in his defence;
(l) the form of orders and other documents to be made for the purposes of any provisions of this Act or the Rules of Procedure relating to the investigation or trial of, or award of punishment for, offences cognizable by courts-martial, commanding officers or appropriate superior authorities, or to the confirmation and revision of the findings and sentences of courts-martial; and
(m) any other matter which by this Part is required or authorized to be prescribed.

(3) Rules of Procedure made by virtue of paragraph (j) of the last foregoing subsection shall secure that the power to amend charges shall not be exercisable in circumstances substantially different from those in which charges are amendable by a civil court in the Federation, or otherwise than subject to the like conditions, as nearly as circumstances permit, as those subject to which charges are so amendable, and shall not be exercisable by a court-martial (otherwise than for the purpose only of correcting a mistake in the name or description of the accused or a clerical error or omission) unless there is a judge advocate present at the trial.

(4) Rules of Procedure shall not make provisions with respect to the carrying out of sentences passed by courts-martial or of other punishments awarded under this Part.

(5) A Rule of Procedure which is inconsistent with the provisions of this Act shall, to the extent of the inconsistency, be void.

It is clear that s 119 of the Act gives power to the Minister to make rules of procedure only but not to make rules conferring jurisdiction on any person. Rule 63(3) of the Rules which is challenged by the applicant confers jurisdiction to the convening officer or authority to 'approve' or 'disapprove' a decision made by a court-martial under r 63(2) of the Rules.

To determine the validity of this r 63(3), it is necessary to examine the relevant provision of the Act to see if this r 63(3) can be sustained.

I note that the officer who convenes a court-martial is, under s 126 of the Act, a 'confirming officer' who has power to confirm the finding or sentence of a court-martial. But the provisions of ss 122 to 125 of the Act gives power to a confirming officer to confirm only a finding of guilt of an accused person by a court-martial. The Act does not give power to a confirming officer to confirm, to withhold or to refuse confirmation of a finding of not guilty made by a court-martial. It appears that the intention of Parliament is that there is need for an order made by a court-martial to be confirmed by a confirming officer, only where the court-martial has found an accused guilty of any charge. Section 122(1) and (2) states:

(1) Where a court-martial finds an accused guilty on any charge, the record of the proceedings of the court-martial shall be transmitted to a confirming officer for confirmation of the finding and sentence of the court-martial on that charge.

(2) A finding of guilty or sentence of a court-martial shall not be treated as a finding or sentence of the court-martial until confirmed:

...

Similarly, ss 123, 124 and 125 of the Act deal with matters which a confirming officer may do after a court-martial has found an accused guilty or has passed sentence on the accused.

Therefore, where a court-martial has found an accused person not guilty of the offence charged, or as in this case, that the court-martial had found that the offence had been condoned by his commanding officer, the Act does not require, and does not confer any power on, a confirming officer or any other person to approve or confirm such finding or order made by the court-martial.

Section 146(1) of the Act states:

> Where a person subject to service law under this Act:
>
> (a) has been tried for an offence by a competent civil court or a court-martial or has had an offence committed by him taken into consideration by any such court in sentencing him; or
> (b) has been charged with an offence under this Act and has had the charge dismissed, or has been found guilty on the charge by his commanding officer or an appropriate superior authority; or
> (c) has had an offence condoned by his commanding officer,
>
> he shall not be liable in respect of that offence to be tried by court-martial or to have the case dealt with summarily by his commanding officer or an appropriate superior authority.

I am of the view that a court-martial, having heard the evidence and the submissions from both the accused and the prosecutor under r 63(1)(a) and (b), is the competent authority to decide the question as to who is the appropriate commanding officer, and whether the commanding officer has condoned the offences allegedly committed by the accused person. Although the officer convening a court-martial is a confirming officer under s 126(1) of the Act, he is not required by the Act to confirm a finding made by the court-martial that an offence has been properly condoned.

The provision of s 146(1) of the Act is quite clear that once the court-martial has decided that an offence committed by the accused has been condoned by his commanding officer, the convening officer has to accept that finding or decision, and he cannot convene another court-martial to retry the accused on the same charges. I therefore find that r 63(3) is void to the extent that it confers jurisdiction on the convening authority to disapprove a decision of a court-martial allowing a plea in bar of trial because such rule is inconsistent with ss 122 to 125 of the Act; and it is also void to the extent that it confers jurisdiction on the convening authority to convene a fresh court martial to try the accused on the same charges which a court-martial has found to have been condoned by the accused's commanding officer because this provision is inconsistent with s 146(1).

Having made such findings, I held that the order of the first respondent made on 25 March 1989 had been made without jurisdiction and must be quashed.

In his argument, learned counsel for the respondent referred to the affidavit in reply of the first respondent which made an allegation that the commanding officer Lt Colonel Yeoh who had condoned the eight offences had no authority to condone the offences. This affidavit did not disclose the name of the person who was the actual commanding officer who could condone the offences committed by Major Phang. It also alleged that the commanding officer Lt Colonel Yeoh had condoned the offences without knowledge of all the relevant circumstances contrary to s 146(2)(d) of the Act which states:

> ... an offence shall be deemed to have been condoned by the commanding officer of a person alleged to have committed the offence if, and only if, that officer or any officer authorized by him to act in relation to the alleged offence has with knowledge of all relevant circumstances informed him that he will not be charged therewith;

To support these allegations, learned counsel for the respondents attempted to tender from the Bar a copy of the notes of proceedings at the hearing of the court-martial. This was rightly objected to by learned counsel for the applicant since it could and should have been made an exhibit to the affidavit-in-reply of the first respondent. As to why these facts, if true, were not brought to the attention of the court-martial, learned counsel for the respondents said that either through oversight or some confusions these facts were not brought out by the prosecutor before the court-martial, and because of that the prosecutor had not challenged the authority of Lt Colonel Yeoh as the commanding officer, to condone those offences. The court-martial therefore had accepted that Lt Colonel Yeoh was the commanding officer of Major Phang, and had made the finding that Lt Colonel Yeoh had properly condoned those offences.

Section 115(1) of the Act states:

> Save as otherwise provided in this Act, the rules of evidence to be observed in proceedings before courts-martial shall be the same as those which are observed in civil courts in the Federation, and no person shall be required in proceedings before a court-martial to answer any question or to produce any document which he could not be required to answer or to produce in similar proceedings before a civil court in the Federation.

The rule relating to the adducing of fresh evidence observed in a civil court, which under s 115 of the Act has to be applied and observed by a court-martial is as follows, per Lord Chelmsford in *Shedden* v *Patrick*[1] at p 731:

> It is an invariable rule in all the courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of the trial or by proper diligence might have been obtained, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.

The fresh evidence which the first respondent required to be put to a fresh court-martial was either in the possession of the court-martial prosecutor, or could have been obtained by him if he had been diligent, such as by interviewing the first respondent or calling him to give evidence at the court-martial when the court-martial was hearing evidence under r 63(1)(a) and (b) of the Rules.

It can be seen quite clearly that the purpose of the first respondent's decision to convene a fresh court-martial is to enable the prosecutor to put in the first respondent's own opinion that Lt Colonel Yeoh was not the proper commanding officer of Major Phang, in the form of fresh evidence so that the fresh court-martial will reject the plea

in bar of trial put by Major Phang. It was not disputed by learned counsel for the respondents that the court-martial had been properly constituted and competent to hear and had heard evidence and arguments from both Major Phang and the prosecutor before making its decision to uphold the plea in bar of trial. The matter is res judicata. Res judicata is based on the principle that once a competent authority has decided on a matter in issue between the parties after a full inquiry the matter should not be permitted to be reagitated. To constitute res judicata, therefore, an earlier judgment or decision must necessarily and with precision determine the point in issue — see *National Union of Hotel, Bar and Restaurant Workers* v *Casuarina Beach Hotel Sdn Bhd*[2] at p 25.

The first respondent had therefore committed an error of law affecting jurisdiction when he rejected the finding and decision of the court-martial and ordered a fresh court-martial be convened to retry Major Phang.

It was further submitted by learned counsel for the respondents that there was in fact no trial held by the court-martial under s 146(1)(a) or (b) of the Act. Because of this he submitted that the first respondent was correct in ordering Major Phang to be tried on the eight charges. I cannot accept this argument as correct. An offer of a plea in bar of trial in reliance upon the condonation of the eight offences under s 146(1)(c) of the Act is a submission that the court-martial had no jurisdiction to try him on the eight charges because the offences had been condoned. To 'condone' is to overlook, forgive, or treat as non existing. Therefore, where the court-martial having heard the evidence from both parties came to a definite conclusion that the offences had been properly condoned, and there being no additional charges outstanding against Major Phang, the court-martial was left with no charge to try Major Phang.

I find that the first respondent, when making the decision dated 25 March 1989, had acted without or in excess of jurisdiction. I allow this application with costs, and order that the said decision of the first respondent be forthwith quashed on its removal to the High Court. I also make the further order that the respondents be prohibited from convening a fresh court-martial to try the applicant on the same eight charges.

Application allowed.

Solicitors: *Nashir, Johal & Co.*

Reported by *Yap Shao Sin*